THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

WAGGONER CARR
ATTORNEY GENERAL

June 27, 1966

Honorable William B. Sullivant
County Attorney
Cooke County
Gainesville, Texas

Opinion No. C-715

Re: Under the submitted facts, whether justice precincts 1, 4, 5 and 8 in Cooke County, Texas are wet or dry with regards to the sale of beer.

Dear Mr. Sullivant:

Your letter requesting an opinion of this office reads, in part, as follows:

"A question has arisen in Cooke County, concerning the legality of the sale of alcoholic beverage, to-wit: beer, in certain precincts in our County. The facts are as follows:

"In 1910 all of Cooke County was dry.

"On April 28, 1934, Justice Precincts 4, 5, and 8 voted in Local Option elections to go wet so far as pertains to the sale of beer 3.2 percent alcohol by weight. On the same date, a County wide Local Option election was held and the entire County voted dry.

"On July 20, 1935, Justice Court Precinct 1 in Cooke County, Texas, held a Local Option election and voted wet for the purposes of selling 3.2 beer.

"On February 8, 1936, a County wide Local Option election was held wherein the question was whether or not it would be legal to sell beer with an alcoholic content of 4% by weight. The results of this election were 1,678 against allowing the sale of the beer, and 1,676 for. On May 30, 1936, a County wide Local Option election was held in Cooke County wherein the question was whether or not it would be legal to sell alcoholic beverage with an alcohol

> content of not more than 14% by volume. The County voted dry in this election. On each of the following dates, March 30, 1937, July 23, 1938, August 19, 1939, County wide Local Option elections were held in Cooke County, Texas, and the proposition was whether or not it would be legal to sell beer in Cooke County with an alcoholic content not to exceed 4% by weight.
>
> "Since August 19, 1939, there have been no further Local Option elections that would in my opinion have any bearing on my question.
> . . .
>
> "My question is as follows: At this time, are Justice Precints 1, 4, 5, and 8 in Cooke County, Texas, wet or dry with regards to the sale of 3.2 beer in view of the above stated facts? In neither of the Precinct elections in Precincts 1, 4, 5, and 8, was it stated whether or not the election was for the on or off premises sale of beer. I assume that if the people voted to allow the sale of beer and did not specify on or off premises, then the sale of beer either on or off premises would be legal. If you can clarify this point for me, I would also appreciate it very much."

You did not advise us as to whether in the County wide elections held on March 30, 1937, July 23, 1938 and August 19, 1939, the County voted dry or wet. We assume that the last County wide election resulted in a dry vote, otherwise you would not have had an occasion to request our opinion.

The Supreme Court of Texas in Walling v. King, 87 S. W.2d 1074 (1935), and Coker v. Kmeicik, 87 S.W.2d 1076 (1935), held that when a county has voted prohibition, until prohibition is repealed by a vote of the entire county, a justice precinct, town or city may not hold a local option election to permit the sale of 3.2% beer. The Commission of Appeals opinions above were adopted by the Supreme Court and based its decision upon Acts 1933, Chapter 116; Constitution, Article 16, Section 20, as amended in 1933; Article 16, Section 20, adopted in 1919.

Article 16, Section 20, of the Constitution of Texas was amended on August 24, 1935, and Article 666-32, Vernon's Penal Code, was enacted to carry the provisions of Section

20 into effect. The Court in Myers v. Martinez, 320 S.W.2d 862 (Tex.Civ.App. 1959, error ref. n.r.e.), construed the 1935 constitutional amendment and Article 666-32 and held that the Legislature, in submitting the constitutional amendment, and the people, in adopting the 1935 amendment, intended that counties, justice's precincts and cities should be on an equal footing and that by complying with the provisions of the law any of them might hold an election to legalize or prohibit the sale of alcoholic beverages; and that a city located within a dry county may vote to legalize the sale of alcoholic beverages within the corporate limits of the city.

In Mayhew v. Garrett, 90 S.W.2d 1104 (Tex.Civ.App. 1936, error ref.), the Court held that the constitutional amendement (Art. 16, § 20) of August 24, 1935, and Vernon's Penal Code, Arts. 667-1(b), 666-23 did not purport to act retroactively to validate or ratify elections illegally held in justice precincts, towns or cities located wholly within dry counties under the constitutional amendment of 1933, Article 16, Section 20 of the Texas Constitution. This opinion in conjunction with the Walling v. King and Coker v. Kmeicik opinions, supra, clearly holds that any election held prior to the constitutional amendment of 1935 in a justice precinct, town or city located wholly within a dry county is void.

In applying the above decisions to the facts submitted in your opinion request, it is the opinion of this office that Cooke County was a dry county on April 28, 1934, and on July 20, 1935. Therefore, since the elections were held in Justice Precincts 1, 4, 5, and 8 prior to the 1935 constitutional amendment, such elections were unauthorized and void, and do not legalize the sale of beer in said precincts.

S U M M A R Y

In dry counties, local option elections in justice precincts and incorporated cities and towns, held prior to the 1935 amendment of Section 20 of Article 16 of the Texas Constitution are void elections, and do not legalize the sale of beer therein.

Yours very truly,

WAGGONER CARR
Attorney General of Texas

Douglas H. Chilton
DOUGLAS H. CHILTON
Assistant Attorney General

DHC/dt

APPROVED:

OPINION COMMITTEE

W. V. Geppert, Chairman
Lonny F. Zwiener
Mary K. Wall
John Reeves
Sam Kelley

APPROVED FOR THE ATTORNEY GENERAL
By T. B. Wright